SUPREME COURT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1134

PBW STOCK EXCHANGE, INC.,
EQUITY SERVICES, INC.; GUARDIAN ADVISERS, INC.;
PENN MUTUAL SECURITIES CORPORATION,
CONNECTICUT NUTMEG SECURITIES, INC.,
and
ROBERT I. BERDON as Treasurer of the State of
Connecticut, and President of
CONNECTICUT NUTMEG SECURITIES, INC., *Petitioners*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*

## BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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### INTEREST OF THE AMICUS CURIAE [1]

The American Insurance Association (hereinafter "AIA") is a national organization of approximately 126 companies that sell property and casualty insurance throughout the United States.

[1] All of the parties have given their written consent to the filing of this brief.

A significant portion of the assets of member [2] and non-member property and casualty companies has been and continues to be in common stock. [3] Those equity investments, made in conformity with state laws and regulations, provide the requisite liquidity and protection against inflation that enables such companies to insure safely against a wide variety of risks.

The proposed S.E.C. Rule 19b-2 (hereinafter the "80 20 rule") would seriously affect the manner in which such companies manage those investments. A significant number of AIA member affiliated companies have already become members of regional exchanges and have assumed the normal capital costs and responsibilities of exchange members. It is expected that others would follow a similar course of action. Such membership results in significant cost savings in the execution of common stock transactions since, under the present fixed minimum commission rate schedule, exchange members are afforded lower commission rates than non-members.

The adoption of the 80 20 Rule by the S.E.C. with its requirement that brokers conduct 80% of their business with unaffiliated customers, would effectively preclude the continued operation of these company-affiliated brokers. The result would be a more costly method of conducting stock transactions. That increased cost would necessarily have an impact on the cost of insurance to the public.

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[2] AIA member companies manage approximately $28 billion in assets.

[3] In 1971, the amount of common stock held by all property and causalty insurance companies was over $15.5 billion.

The AIA, which has actively participated in this matter before the S.E.C. and has filed a brief as *amicus curiae* in the Court below, appears herein on behalf of those members who are already exchange members as well as those members who may want to assume similar responsibilities in the future for the same reasons. Accordingly, AIA has a vital interest in urging this Court to grant the petition for certiorari.

## ARGUMENT

### A. The Decision of the Court Below that Quasi-Adjudicatory Administrative Action Is Not Reviewable Under Section 25(a) Conflicts with the Standards for Review of Administrative Action Established by This Court

The Court below, after consideration of this Court's principal decisions determining the availability of review of quasi-adjudicatory administrative actions concluded that:

> The thrust of each of them (the Supreme Court Decisions) is that courts should carefully scrutinize the statute and its history to determine the intendment of Congress as manifested in the terms of the statute. Such an examination convinces us that Congress intended to withhold the type of review here sought by petitioners.

The intendment of a statutory provision for judicial review is an obviously desirable and relevant consideration, but where, as here, there is no clear legislative history and the "rule" takes on the characteristic of an "order", it is the substance rather than the form which determines the appropriate forum for review.[4]

[4] In considering the question of the availability of judicial review, this Court has clearly indicated that there must be a presumption in favor of such review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 134 (1967).

This Court in the principal case in this area, *Columbia Broadcasting System Inc.* v. *United States*, 316 U.S. 407 (1941) [5], held that "the particular label placed upon [the Federal Communications Commission action] . . . is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." The Commission had, in *CBS*, issued regulations designed to control certain contractual relations between broadcasting networks and their affiliated stations. The document promulgating those regulations was designated an "order", but was described by the Commission as "the expression of general policy we will follow in exercising our licensing power." *Id.* at 411. This Court in concluding that the agency action was reviewable under a statutory provision permitting review of certain "orders" rested its holding not solely on the presence of the agency's implementing "order" but also on the basis that the regulations, viewed as regulations, were reviewable. [6] It held that "regulations which affect or determine rights generally even though not directed to any particular person . . . have the force of law and are orders reviewable under the Urgent Deficiencies Act." *Id.* at 417.

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[5] It should be noted that the case principally relied upon by the Court below, *A.F. of L.* v. *NLRB*, 308 U.S. 401 (1940) was cited by this Court in *Columbia Broadcasting System* v. *United States*, *supra*, at 419-420 as lending some support to the proposition that an "argument addressed to the form rather than the substance of the order (is to be) rejected."

[6] "When, as here, (the regulations) are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act." *Id.* at 418-19.

This approach to judicial review was reiterated in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), where the Interstate Commerce Commission had issued an "order" declaring certain products as not exempt from regulation. When a motor carrier in the business of transporting such commodities challenged the I.C.C. order, the government successfully moved to dismiss the action in the District Court on the grounds that there was no "order" as required by the statutory provisions for judicial review. This Court reversed that decision holding that the agency action which was "not . . . abstract, theoretical, or academic" and which served as "the basis for carriers in ordering and arranging their affairs"[7] was just such an order as contemplated in the statutory provisions for review.

The critical factor of reviewability was, as in this case, the "immediate and practical impact" of the agency's action.

Similarly, in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 200 (1956) an FCC "order" amending the Multiple Ownership Rules governing corporate relationships among television stations was held to be reviewable because that action resulted in "[t]he Rules now operat[ing] to control the business affairs of Storer."

Rule 19b-2 was clearly aimed at institutional membership and at the PBW Stock Exchange. Its effect is to prevent PBW from retaining a vital part of its membership. Institutional members presently account for 35% of the trading volume of the PBW Exchange and for 43% of its revenues. The effect of the

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[7] *Frozen Food Express* v. *United States*, *supra*, at 44.

rule on some members of the AIA who are also members of the PBW Exchange will be to deprive them of the chance to save millions of dollars in brokerage commissions. This will necessarily have an impact on the cost of insurance to the public. As it is clear that the principal thrust and the aerual force and intent of Rule 19b-2 as promulgated, is the regulation of a limited segment of the investment community and as the impact of that rule is at least as direct and material as the impact involved in the agency actions of *CBS, Storer* and *Frozen Food,* the decision of the Court below is clearly in error.

The attempted distinction of this case from *CBS, Storer* and *Frozen Food* undertaken by the Court below, on the basis that each of those cases involved rulemaking proceedings implemented by an order is singularly unconvincing. Such a distinction undermines the reasoning at the base of each case that it is not the label or the arbitrary characterizations which govern the availability of review of agency orders, but rather the direct and substantive impact of the action itself.

**B. The Decision of the Court Below Is in Conflict with Decisions of the Court of Appeals for the District of Columbia Circuit**

The Court of Appeals for the District of Columbia has decided several cases involving the issues of reviewability of agency action similar to those presented in the instant case. In addition to matters involving other administrative agencies such as the Civil Aeronautics Board [8] and the Federal Power Commission [9]

[8] *Deutsche Lufthansa Aktiengesellschaft* v. *Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

[9] *City of Chicago, Illinois* v. *Federal Power Commission*, 458 F.2d 731 (D.C. Cir. 1971) *cert. denied*, 405 U.S. 1074 (1972).

there have been two cases of particular interest and applicability.

The first of these is *Medical Commission for Human Rights* v. *Securities and Exchange Commission,* 432 F.2d 659 (D.C. Cir. 1970) vacated as moot 404 U.S. 403 (1972). The Court of Appeals in that case considered the applicability of Section 25(a) to the agency's refusal (in a "no-action" letter) to require the inclusion of a proposal in a proxy statement. The absence of an "order" did not deter the Court from concluding that review under Section 25(a) was appropriate. That conclusion was premised upon several factors, the most important of which appear to have been the absence of any legislative history indicating a clear intent to preclude such review, the practical impact of the agency action on the petitioner and the general presumption of reviewability of administrative action set out by this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

In the second case, *Philadelphia Company* v. *Securities and Exchange Commission,* 164 F.2d 889 (D.C. Cir. 1947) *cert. denied,* 333 U.S. 828 (1948), the Court addressed the reviewability of SEC action under Section 24(a) of the Public Utility Holding Company Act; identical to Section 25(a) of the Exchange Act. The SEC had amended certain of its rules with the resultant effect of revoking the petitioner's exemption from the provisions of that Act. The action was challenged under the statutory provisions providing for review of an SEC "order". In relying upon the rationale of this Court in *CBS* the Court looked to the practical effect of the agency action and upheld the availability of direct appellate review.

## CONCLUSION

The decision of the Court below is in conflict with prior decisions of this Court and with decisions of another circuit. The issue is one of significant legal importance and should be decided by this Court.

Respectfully submitted,

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